Schuylkill Medical Center South Jackson Street d/b/a Lehigh Valley Hospital—Schuylkill South Jackson Street *and* Schuylkill Medical Center East Norwegian Street d/b/a Lehigh Valley Hospital—Schuylkill East Norwegian Street *and* SEIU Healthcare Pennsylvania, Petitioner. Cases 04–UC–200537 and 04–UC–200541

February 28, 2019

DECISION ON REVIEW AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN AND KAPLAN

The issue presented in this case is whether the Regional Director properly clarified the existing unit of certain of the Employer's licensed practical nurses (LPNs), technical employees, and service and maintenance employees, historically based at the Employer's 420 South Jackson Street hospital site, to include a group of unrepresented employees working at the Employer's 700 East Norwegian Street hospital site following the partial integration of the two facilities.

On October 6, 2017, the Regional Director issued a Decision, Order, and Clarification of Bargaining Unit, in which he granted the Petitioner's petitions for unit clarification and found that the unrepresented employees are an accretion to the existing unit. Thereafter, in accordance with Section 102.67 of the Board's Rules and Regulations, the Employer filed a timely request for review. The Petitioner filed an opposition to the request.

On January 24, 2018, the Board granted the Employer's request for review in part and invited briefing on whether the Regional Director's accretion finding is consistent with the standard articulated in *Safeway Stores, Inc.*, 256 NLRB 918 (1981).[1] Thereafter, the Employer and Petitioner filed briefs on review. The Board also accepted an amicus brief from a number of employees who work at the Employer's 700 East Norwegian Street hospital.[2]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.[3] Having carefully considered the entire record in this proceeding, including the briefs on review and the amicus brief, for the reasons stated below, we reverse the Regional Director's clarification of the bargaining unit to include the unrepresented employees, and we dismiss the petition.

I. FACTS

Schuylkill Medical Center South Jackson Street and Schuylkill Medical Center East Norwegian Street (collectively, the Employer) operate a hospital located in Pottsville, Pennsylvania. The integrated hospital is located at two different sites, which are approximately a half mile apart. One site is located at 420 South Jackson Street "South") and another at 700 East Norwegian Street ("East"). For many years, the Employer's predecessor, Schuylkill Health System ("SHS"), operated these two hospitals as independent entities. During this period, SEIU Healthcare Pennsylvania (the Petitioner) came to represent a combined unit of LPNs, technical employees, and service and maintenance employees at South, which was governed by a single collective-bargaining agreement.[4] The employees in these classifications at East, however, remained unrepresented.

In 2015, SHS decided to combat financial losses at the two hospitals by merging them into a single-integrated hospital with two sites. The purpose of the integration was to eliminate duplicative services offered at both sites by consolidating all medical, surgical, obstetric/gynecological, and emergency services at East, while consolidating all rehabilitative services at South. Because some of these services were offered at both sites, the integration therefore moved a significant number of positions from one hospital site to another.

In March and April of 2015, the Petitioner and SHS commenced bargaining about the effects of the planned integration in attempt to reach an agreement before the imminent expiration of the collective-bargaining agreement then in effect. SHS and the Petitioner began by negotiating a set of integration guidelines to address the integration process. The guidelines provided for a dovetailed seniority list that allowed existing employees, both represented and unrepresented, to bid into positions at either South or East. The integration guidelines further stated that all of the represented employees then located at South would remain in the unit, even if they were permanently or temporarily transferred to positions at

[1] The request for review was denied in all other respects.

[2] In the order granting review in part, the Board denied these employees' motion to intervene.

[3] Member Emanuel took no part in the consideration of this case.

[4] When the Petitioner was originally certified, the Board issued three certifications for three separate units: one technical unit, one nurses' unit, and one service/maintenance unit. Along these lines, the Petitioner filed two unit clarification petitions in the instant dispute, one covering the service and maintenance employees and another covering both the technical employees and the LPNs. However, the parties have stipulated that, notwithstanding the three certifications, all three units have been combined and are now governed by the same collective-bargaining agreement. For this reason, the Regional Director's Decision, Order, and Clarification of Bargaining Unit referred to a single combined unit, and we do the same in our decision.

East. The guidelines did not, however, accrete the previously unrepresented East employees into the unit. When the collective-bargaining agreement expired in November 2015, the guidelines remained in effect as SHS and the Petitioner continued to negotiate a successor agreement.[5]

When the Employer succeeded SHS as the operator of the hospital in 2016, it continued the integration process in accordance with the integration guidelines. The Employer also continued negotiations for a successor collective-bargaining agreement, which ultimately culminated in the ratification of a successor agreement on April 27, 2017. The new collective-bargaining agreement incorporated the unit descriptions from the prior collective-bargaining agreement and provided that the integration guidelines would remain in effect until March 31, 2019. As of April 1, 2019, employees in the bargaining unit who transferred to work at East under the terms of the guidelines would remain members of the bargaining unit so long as they remained in the positions they held on March 31, 2019. Because many unit employees at South had accepted positions in which they permanently transferred to East or were scheduled to rotate there frequently, the parties' agreement to keep all former South employees in the unit effectively created a situation where unrepresented East employees and some represented former-South employees worked side-by-side in many departments at East. This prompted the Petitioner to file two petitions for unit clarification, which were later consolidated and are the subject of the instant dispute. This consolidated petition seeks to accrete the unrepresented LPNs, technical employees, and service and maintenance employees at East into the existing unit, which is now comprised of employees who have remained at South and those former South employees who have permanently transferred to, or regularly rotate to, East.

The proposed clarified unit encompasses 380 employees. At the time that the petitions were filed, the South and East hospitals had been fully integrated with the exception of three areas: (1) inpatient rehabilitation services had yet to be moved from East to South; (2) obstetrics, pediatrics, and gynecology had yet to be moved from South to East; and (3) the emergency department at South had yet to be converted to an urgent care center. As a result, at the time of the hearing approximately 68 union-represented employees from South (approximately 17 percent of the proposed clarified unit) had been permanently transferred to East, while another 57 union-represented employees from South (approximately 15 percent of the proposed clarified unit) had taken positions where they rotate on some basis between the two locations. A significant portion of the proposed clarified unit, however, did not experience any change in location due to the integration, as 93 of the represented employees who worked at South (approximately 24 percent of the proposed clarified unit) continued to work there and did not perform work at East, while none of the 162 unrepresented employees who worked at East (approximately 42 percent of the proposed clarified unit) had been transferred to or worked at South, either permanently or via rotation, with one exception.[6]

Generally speaking, this distribution of employees has created three different types of departments across the Employer's hospital operation, all of which vary in terms of the amount of contact, integration, and interchange that occurs between represented and unrepresented employees in the department. First, a significant number of departments—including various departments at South (home health, the adolescent and adult health units, behavioral health, obstetrics and pediatrics, the pharmacy department, the housekeeping department, dietary department, maintenance department, and the emergency room) and several at East (the Stine rehabilitation center, senior behavioral health department, and maintenance department)—were unaffected by the integration, and therefore remain staffed solely by only already-represented or only unrepresented employees. The integration has not resulted in employees in any of these departments being relocated, and there is no evidence that employees in any of these departments ever work at the other location. Although about half of these departments share a supervisor with a department at the other location, such as a shared supervisor for the pharmacy departments at both South and East, the parallel departments at each location largely operate independently. For example, the same head chef supervises the corresponding dietary departments at both South and East, but travels between the two sites in order to supervise the employees at each location and holds separate meetings for employees at each location that employees from the other location do not attend. Similarly, although both South and East have emergency departments, two different supervisors determine the employee schedules for each location. Thus, the many employees who have remained in these unaffected departments have no significant interaction, contact, or interchange with employees

[5] The collective-bargaining agreement was originally set to expire on June 30, 2015. The parties executed a series of extensions to the agreement while bargaining over a successor agreement, and as a result, the collective-bargaining agreement did not expire until November 30, 2015.

[6] There is one East laboratory employee who is scheduled to work every other weekend at South.

at the other location who have a different representational status.[7]

Second, the permanent transfer of some employees from South to East has created some "mixed" departments at East where represented and unrepresented employees work side-by-side on a daily basis.[8] The "mixed" departments include the East housekeeping and dietary departments (including laundry and central supply), the East pharmacy, "5 North" and "6 North," critical care, senior behavioral health, the operating room and surgical suites, the emergency department at East, and nurses who are permanently assigned to the East clinical departments. Employees who work the same job within the same "mixed" department have regular, daily contact with employees of a different representational status, and may help each other and cover for each other when on break or out sick. Importantly, however, there is little interaction between unrepresented employees in "mixed" departments at East and represented employees who have remained at South. While a small number of employees in "mixed" East departments testified to "swapping" assignments with or covering for an employee at a different site, or working overtime at a different site, this practice is limited to unit employees occasionally working at South for another unit employee. Thus, while represented employees who work in similar departments at different sites may engage in some minimal temporary interchange with each other, there is no evidence of interchange between represented and unrepresented employees at different sites. And, as explained above, "mixed" departments that have a corresponding, unmixed department at South operate more-or-less independently from their counterpart, even where the two departments share a supervisor.

Third, the integration has created a few centrally run departments, predominantly limited to ancillary services, including the laboratory, radiology, respiratory, cardiopulmonary, CAT Scan, EEG & EKG, and ultrasound departments, along with pool nurses and the surgery departments. These departments are centrally run to service both sites at once, and therefore have supervisors who directly supervise both unrepresented and represented employees and who hold meetings attended by both groups. Even in these centrally run departments, many employees originated at either South or East and continue to be permanently assigned to one of those sites after the integration, although some represented South employees have been permanently transferred to service departments at East, and at times other already-represented employees rotate amongst themselves between the two sites. As a result, the ancillary services employees who work at East or who rotate between the two hospitals have regular contact and interaction with employees of a different representational status. Ancillary services employees who have remained only at South, however, have a more limited relationship with the unrepresented employees at East, largely confined to their common supervision and shared meetings.

Whether union or nonunion or at South or East, all employees in the same classification perform the same job duties and have the same skills. They wear the same uniforms, work the same general shifts, wear the same ID badges and, when they work in the same site, share the same break rooms and cafeterias. Due to the integration of South employees into the East departments and the centralized ancillary services departments, roughly 74 percent of the proposed clarified unit employees share an immediate supervisor with an employee of a different representational status. The Employer has central control over both sites, including a human resources department with the authority to hire, fire, and discipline employees at both sites. The same senior managers exercise control at both sites, which are less than half a mile apart, and operate them as an integrated hospital.

Finally, with respect to terms and conditions of employment, employees at East and South are governed by separate HR policies and employee handbooks, although many of these policies, including those related to sexual harassment, uniforms, cell phone usage, and confidentiality, are substantively identical. However, all unit employees, including those unit members now working at East, are also governed by the collective-bargaining agreement. This leads to notable differences in terms and conditions of employment between represented and unrepresented employees in a variety of areas, including, but not limited to, different systems for scheduling vacations and choosing which holidays employees can take off from work; rotating shifts; number of breaks per day; grievance procedures; layoff procedures; absenteeism policies; wage rates; overtime; health insurance options; and sick leave.

II. THE REGIONAL DIRECTOR'S DECISION

In his decision, the Regional Director applied the Board's decision in *Gitano Distribution Center*, 308

[7] The few examples of contact between corresponding departments at South and East are fairly minimal. For example, the pharmacy department at South occasionally has to contact East when it runs low on certain medications, since all prescription processing and ordering is done through East; the dietary departments sometimes need to contact each other for food supplies when they are running low; and the meetings for the emergency room department at South involve the emergency room department employees at East calling in, but only occur once a month.

[8] There is no evidence of unrepresented East employees transferred to work at South with represented employees.

NLRB 1172 (1992). The *Gitano* decision holds that when an employer transfers a portion of its employees at one location to a new location, the Board applies a rebuttable presumption that a unit at the new facility is a separate appropriate unit and will only "accrete" employees into the existing unit if that presumption is rebutted. Id. at 1175. The Regional Director found that, in the instant dispute, several factors weighed in favor of rebutting the presumption, including common supervision, significant interchange between the facilities, central control over daily operations and labor relations, and similarity of employee skills, functions, and working conditions. He then concluded that, since the single-facility presumption had been rebutted, the Board should "accrete the employees involved to the existing bargaining unit." See *Mercy Health Services*, 311 NLRB 367, 367 (1993).

I. ANALYSIS

A. The Board's Accretion Test

At the outset, we find that the *Gitano* test is inapplicable to this case. The *Gitano* test applies solely to represented employees who have been transferred by their employer to a new facility and determines whether those relocated employees *themselves* can be "accreted" back into their old unit at the original facility without having to establish a separate unit at their new location. See *Steelworkers Local 7912 (U.S. Tsubaki)*, 338 NLRB 29, 29 (2002) (describing the *Gitano* holding as establishing "a rebuttable presumption that *the relocated employees* constitute a separate appropriate unit at their new facility") (emphasis added); *Rock Bottom Stores*, *Inc.*, 312 NLRB 400, 402 (1993) (describing the *Gitano* analysis as focusing on "the issue of whether *the relocated portion of the bargaining unit* constitutes an appropriate bargaining unit separate from the remaining unit at the old facility") (emphasis added). Here, however, there is no dispute over the representational status of any relocated unit employees from South, because the parties agreed in the integration guidelines and successor collective-bargaining agreement that employees relocated to East from South would remain in the unit. Accordingly, the Regional Director erred in applying *Gitano* to the instant dispute, and we proceed under the Board's traditional accretion analysis.

As the Board has explained, "[t]he fundamental purpose of the accretion doctrine is to preserve industrial stability by allowing adjustments in bargaining units to conform to new industrial conditions without requiring an adversary election every time new jobs are created or other alterations in industrial routine are made." *Frontier Telephone of Rochester, Inc.*, 344 NLRB 1270, 1271 (2005), enfd. 181 Fed.Appx. 85 (2d Cir. 2006) (internal citations omitted). The Board has acknowledged that "because accreted employees are absorbed into an existing bargaining unit without an election or other demonstrated showing of majority status, the accretion doctrine's goal of promoting industrial stability places it in tension with the right of employees to freely choose their bargaining representative." Id. The Board therefore follows a restrictive policy in finding accretions to existing units. See *Super Valu Stores*, 283 NLRB 134, 136 (1987). Under this restrictive policy, as articulated in *Safeway Stores, Inc.*, 256 NLRB 918, 918 (1981), the Board finds "a valid accretion only when the additional employees have little or no separate group identity and thus cannot be considered to be a separate appropriate unit and when the additional employees share an overwhelming community of interest with the preexisting unit to which they are accreted." Without these two elements there can be no accretion.

In determining whether this standard has been met, the Board considers its traditional community-of-interest factors, including integration of operations, centralization of management and administrative control, geographic proximity, similarity of working conditions, skills and functions, common control of labor relations, collective-bargaining history, degree of separate daily supervision, and degree of employee interchange. See *NV Energy, Inc.*, 362 NLRB 14, 17 (2015); *Frontier Telephone of Rochester*, supra at 1271. The Board recognizes that "the normal situation presents a variety of elements, some militating toward and some against accretion, so [] a balancing of the factors is necessary." *E. I. du Pont*, 341 NLRB 607, 608 (2004) (quoting *Great A & P Tea Co. (Family Savings Center)*, 140 NLRB 1011, 1021 (1963)). But the Board has held that the "two most important factors—indeed, the two factors that have been identified as critical to an accretion finding—are employee interchange and common day-to-day supervision," and that therefore "the absence of these two factors will ordinarily defeat a claim of lawful accretion." *Frontier Telephone of Rochester*, supra at 1271, fn. 7 (internal quotations omitted). The burden to show that accretion is appropriate is "heavy" and it falls on the requesting party. *NV Energy*, supra at 19. Here, that party is the Petitioner.

B. The Petitioner has not Established that the Proposed Additional Employees Share an Overwhelming Community of Interest with the Represented Unit Employees

With respect to separate group identity, unrepresented employees arguably retain at least some separate identity, insofar as they are historically based at East and have not previously been represented. Given that they are not subject to the current collective-bargaining agreement,

they also have a number of different terms and conditions of employment. It is not, however, necessary to resolve this issue, because, as explained below, we find that the unrepresented and represented employees do not share an overwhelming community of interest. For that reason alone there can be no accretion under *Safeway Stores, Inc.*, supra at 918.

With respect to the community-of-interest analysis, the Employer concedes that, as the Regional Director found, certain factors support finding an accretion in this case: specifically, centralization of management and administrative control, geographic proximity, similarity of working conditions, skills and functions, and common control of labor relations. Because these factors are undisputed by the parties, and because we agree with the Regional Director that they support an accretion finding, we do not address them in further detail and turn instead to the remaining disputed factors. With respect to the first critical factor to an accretion finding, common day-to-day supervision, we find that this factor does not clearly support accretion. As noted above, postintegration, roughly 74 percent of employees in the proposed clarified unit technically share an immediate supervisor with another employee who has a different representational status. This high percentage is due primarily to the large number of permanent transfers from South to East, which created several "mixed" departments where represented and unrepresented employees share a supervisor, along with combined supervision in the ancillary services departments. However, this number alone does not fully present the relationship between the represented and unrepresented employees. A significant portion of the 74 percent of employees who share supervision perform work in departments where, although one supervisor supervises parallel departments and moves between the two different sites, the two departments otherwise operate independently, have little contact with one another, and may even consist of only represented or unrepresented employees. Moreover, a notable portion (approximately 26 percent of employees in the proposed clarified unit) do not share common supervision with employees of a different representational status. The fact that a sizable portion of the proposed clarified unit involves employees, both unrepresented and represented, who do not share supervision with an employee of a different representational status, or only share supervision in the most technical sense, undercuts much of the weight that this factor might otherwise have in supporting an accretion here and simultaneously undermines the Petitioner's ability to carry its burden of proof that accretion is appropriate.

We further find that interchange, the second critical factor, weighs against finding an accretion. Approximately 66 percent of the employees in the proposed clarified unit have remained at their original placements at either South or East and have not worked at the other site, either temporarily or permanently. To the extent that some employees testified to "swapping" assignments between sites or working overtime at another site, this practice is limited to already-represented employees swapping amongst themselves, and therefore does not constitute interchange between represented and unrepresented employees. Furthermore, while there have been permanent transfers from South to East, no employee had transferred from East to South at the time that the petition was filed. The Board does not find evidence of one-way or permanent interchange to be particularly persuasive. See, e.g., *Dennison Mfg. Co.*, 296 NLRB 1034, 1037 (1989); *Safeway Stores, Inc.*, 276 NLRB 944, 949 (1985). Finally, while a number of ancillary services employees rotate regularly between South and East, they are already represented, and such rotation accordingly represents interchange between locations rather than interchange between represented and unrepresented employees. Because the accretion test is concerned with the community of interest between the represented and unrepresented employees, temporary interchange that is only between represented employees is of little, if any, significance here. Therefore, we find that the critical factor of interchange weighs against finding an accretion.[9]

[9] In so doing, we reject the Petitioner's emphasis on what it terms the high level of "contact" and "interaction" among represented and unrepresented employees. We agree with the Petitioner that there is contact between represented and unrepresented employees in "mixed" departments, and with respect to represented employees who regularly rotate to East to provide ancillary services. However, we distinguish between that "contact" or "interaction" and the interchange contemplated by the Board's community-of-interest test. Moreover, a significant portion of the existing unit has no meaningful contact with unrepresented employees—specifically, the many represented employees who remained at South and do not rotate between the sites, as well as those departments at East that have remained un-mixed. As discussed above, these represented employees are in departments that either have no corresponding department at East or which operate mostly independently from a corresponding department at East. We find, therefore, that the lack of contact between sizable portions of the represented and unrepresented employees further weighs against finding accretion.

We do not find it particularly relevant or persuasive that, as the Petitioner contends, all employees receive the same newsletter; have access to the same Intranet and receive emails from the President; all employees pick up their personal prescriptions at East; represented and unrepresented employees share the same cafeterias and break rooms; and all employees are welcome to attend certain town halls and events. Whether employees use the same Intranet or receive emails or newsletters from a common source has little, if anything, to do with whether the employees have contact or otherwise interact with each other, however. Moreover, the record does not suggest that employees regularly attend town halls and company events, interact with each in cafeterias

The next two disputed community-of-interest factors, bargaining history and terms and conditions of employment, also weigh against finding an accretion. It is undisputed that the East employees have never been represented by a union, and the Board will generally find that the factor of bargaining history weighs against finding an accretion where the employees to be accreted have either remained unrepresented or have been represented by a different union. See *NV Energy*, supra, at 18; *Frontier Telephone of Rochester*, supra at 1275; *Staten Island University Hospital*, 308 NLRB 58, 61 (1992). While the Board has, on occasion, been prompted to disregard bargaining history where major operational and organizational changes have provided "compelling circumstances" in which to do so, there are no such compelling circumstances here. Although this case arises in the context of organizational consolidation or distribution between South and East, both South and East have been owned and operated by the same entity for many years, with employees at both hospitals reporting to the same management before the departmental integration commenced. Significantly, the parties acted to preserve the status quo with respect to the unit employees' representative status, insulating that status from the changes that have taken place. Cf. *Crown Zellerbach Corp.*, 246 NLRB 202, 204 (1979) ("compelling circumstances" existed to disregard the bargaining history of a prior multiplant unit because the two plants at issue were 1000 miles apart, had no interchange among employees, and utilized entirely different processes).

The terms and conditions of employment likewise weigh against finding an accretion. We acknowledge, as the Petitioner argues, that represented and unrepresented employees share some human resources policies, the length and time of shifts, certain break and working areas, and uniform and ID badge requirements. The two hospitals also share a dovetailed seniority list. However, the existence of the South collective-bargaining agreement places represented and unrepresented employees under differing administrative systems with respect to several particularly significant terms and conditions of employment, including but not limited to leave, shifts, benefits, wage rates, discipline. Accordingly, we find that this factor does not support finding an accretion. See *Frontier Telephone of Rochester*, supra, at 1273 *Staten Island University Hospital*, supra, at 61 (no accretion where seniority and fringe benefits differed among nurses at two different sites who had been represented by two different unions); *Retail Clerks Local 588 (Raleys)*, 224 NLRB 1638, 1641 (1976) enf. denied 565 F.2d 769 (D.C. Cir. 1977).

In sum, we find that four of the traditional accretion factors—the two "critical" factors of supervision and interchange along with bargaining history and the terms and conditions of employment—do not clearly weigh in favor of finding an accretion in this case. Although the factors of supervision and the contact between some of the unrepresented and represented employees at East appear at a glance to support an accretion between some of the represented and unrepresented employees, they do not support an accretion with respect to a sizable portion of the proposed clarified unit, which undercuts the overall weight of those factors. The other, undisputed, factors along with functional integration, in contrast, favor finding an accretion for all of the employees in the proposed clarified unit.[10]

As we stated above, the Petitioner bears the heavy burden of proving that an accretion is appropriate, and the Board has a longstanding policy of applying the doctrine restrictively. See *NV Energy*, supra at 19; *Super Valu Stores*, supra, at 136. Given that burden, we find that the absence of clear evidence regarding the two critical factors as well as the ultimate balance of all factors taken together is insufficient to demonstrate an "overwhelming community of interest" between the represent-

or break rooms, or that they spend much time at East picking up prescriptions.

[10] In addition to the undisputed factors of centralization of management and administrative control, geographic proximity, similarity of working conditions, skills and functions, and common control of labor relations that the Regional Director found to support accretion, we recognize that the factor of functional integration supports an accretion here. The Employer argues that the integration process has led only to "limited" functional integration, as the attempt to reduce duplicate services at both sites has resulted in the two hospitals performing different functions, with East providing certain types of treatment and South providing others. This circumstance, however, actually strengthens the functional integration between represented and unrepresented employees because the Employer's operations constitute a single-integrated unit where the two hospitals work in tandem to address patients' multiple needs, including by transferring patients between the two sites when necessary. This type of functional integration has been found to support an accretion. See *Frontier Telephone of Rochester*, supra at 1272 (finding functional integration where Internet help desk technicians and customer service representatives, despite providing different services, "work in tandem in responding to customer telephone inquiries," "occasionally transfer customers to each other," and work under the authority of the same central management); cf. *Staten Island University Hospital*, supra at 61 (accretion inappropriate where "each facility still provides on its own, substantially all of the patient care services normally provided by an acute care hospital"). Moreover, represented and unrepresented employees are functionally integrated across the two sites in other respects such as the hospitals' ancillary services and the standardization of some of the clinical processes for nurses across the two hospitals. However, as discussed above, these facts are insufficient to overcome the other elements that weigh against accretion.

ed and unrepresented employees that would prove accretion appropriate here.

C. The Facts of this Case Present Policy Concerns Against Accretion

Further, and in addition to the Petitioner's failure to meet its burden under *Safeway Stores, Inc.*, 256 NLRB 918, 918 (1981), the facts of this case present policy concerns that counsel against finding accretion here. The Employer's integration process here has led, in essence, to the creation of two facilities: one partially "integrated" facility (East) where some of the represented employees formerly at South work with a majority of established unrepresented East employees, and another more "independent" facility (South) where a significant portion of the existing unit resides and has no meaningful contact with the unrepresented employees at East. Importantly for our decision here, the "integrated" facility at East is still predominantly comprised of unrepresented employees, as at least 58 percent of the employees at East are unrepresented. This rises to 70 percent if the represented employees who rotate between South and East are excluded from the calculation, isolating those employees who work exclusively at East.

These circumstances implicate policy concerns that the Board has previously expressed with respect to the accretion doctrine. The Board is "cautious" in finding accretions where "the accreted group numerically overshadows the existing certified unit, because it would deprive the larger group of employees of their statutory right to select their own bargaining representative." See *Renaissance Center Partnership*, 239 NLRB 1247, 1247–1248 (1979). Here, the Petitioner is seeking to accrete 162 unrepresented employees into the existing unit, where (1) 93 represented employees have remained at South, do not transfer between the facilities, and therefore have little to no contact with unrepresented employees; (2) 68 represented employees have transferred permanently from South to East and the record shows no such transfers of unrepresented employees from East to South ; and (3) 57 represented employees rotate on some basis between the two sites. Although the already-represented employees in the instant dispute constitute a majority of the Petitioner's proposed clarified unit, they do not constitute a majority of the employees at East, the only truly "integrated" facility. It is only by virtue of the 93 remaining employees working only at South that the represented employees constitute the majority of the proposed clarified unit, and these 93 employees have little to no interaction, interchange, or common supervision with their unrepresented colleagues at East. Thus, while the East employees have a somewhat strong community of interest with the South employees who have been permanently transferred to or rotate regularly to work at East, they have a significantly weaker community of interest with the 93 employees who remain at South and constitute nearly a quarter of the proposed clarified unit. When applying the overwhelming community-of-interest standard as is required for accretion, it is not enough for employees to share similarities with only a portion of the employees in the proposed combined unit. See *Macy's, Inc.*, 361 NLRB 12, 34 (2014).[11] Given that the represented employees comprise a majority of the proposed clarified unit solely by virtue of employees who work only at South, a separate, union-only facility and have little to no contact, supervision, and interchange in common with the unrepresented employees, the Board's historical caution in this area, combined with its restrictive approach to finding an accretion, further supports our finding that the Petitioner has not met its heavy burden to establish the requisite overwhelming community of interest here.[12]

D. Conclusion

In sum, the factors of bargaining history and terms and conditions of employment, as well as the critical factor of interchange, clearly weigh against finding an accretion.

---

[11] While our recent decision in *PCC Structurals, Inc.*, 365 NLRB No. 160 (2017), overruled *Macy's* to the extent that *Macy's* applied an "overwhelming community of interest" standard to the inclusion of additional employees in the initial unit determination context, the Board's description in that case of the "overwhelming community of interest" standard nevertheless remains correct where that standard still applies, such in the context of an accretion.

[12] We distinguish several cases cited by the Petitioner in which the Board has approved accretions involving almost co-equal groups of represented and unrepresented employees. In *Central Soya Co.*, 281 NLRB 1308, 1309 (1986), and *Special Machine & Engineering, Inc.*, 282 NLRB 1410, 1410 (1987), the Board found accretions where the employer transferred a portion of employees from the bargaining unit at one of its existing facilities to a new facility containing unrepresented employees, and then subsequently refused to bargain with respect to all of the employees at the new facility, including both the formerly represented and unrepresented employees. As an initial matter, although these pre-*Gitano* cases were decided under the traditional accretion standard, the circumstances of these cases suggest that, were they to arise today, they would be decided under the *Gitano* standard and accordingly would be inapplicable for the same reasons we have already found *Gitano* inapplicable here. See *Central Soya Co.*, supra at 1310; *Special Machine & Engineering, Inc.*, supra at 1411. Moreover, in finding the accretions, the Board expressed a concern that the employer was integrating the facilities in an attempt to strip the unit employees of their representation by combining them with a slightly smaller number of unrepresented employees. This concern is in no way present here, as the Employer is not questioning its bargaining obligation with respect to the already-represented employees who have transferred or rotate to East; indeed, the integration guidelines expressly preserves the represented employees' representative status. Rather, the Employer is simply contending that its bargaining obligation should not be extended beyond the currently-represented employees at East, who, unlike the employees in *Central Machine* and *Central Soya*, do not outnumber the unrepresented employees within East itself.

Although the critical factor of supervision may favor accretion with respect to some unrepresented employees, as discussed above it is to some degree merely technical and in any event not true of all unrepresented employees, thereby reducing the significance of that factor. Considering that accretion is a restrictive standard, that the relative size of the represented and unrepresented employee groups at East counsel caution, and that there is no concern here that declining to find an accretion would strip previously represented employees of their representational status, we are unwilling to clarify the unit to include the unrepresented East employees based on the balance of the factors present here.

We therefore conclude that, under the standard articulated in *Safeway Stores*, an accretion finding is unwarranted because the Petitioner has not met its heavy burden to demonstrate an overwhelming community of interest between the unrepresented employees at East and the employees in the bargaining unit under the traditional community-of-interest standard set forth in *Safeway Stores, Inc.*, 256 NLRB 918, 918 (1981). We accordingly reverse the Regional Director's decision.

ORDER

The Regional Director's Decision, Order, and Clarification of Bargaining Unit is reversed and the consolidated petition is dismissed.

Dated, Washington, D.C. February 28, 2019

_____

John F. Ring, Chairman

_____

Lauren McFerran, Member

_____

Marvin E. Kaplan, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD